

In the Matter of Merchant Mariner's Document No. Z-1002534 and all
other Seaman Documents
Issued to: CRISTOBAL SANTANA

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

997

CRISTOBAL SANTANA

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

By order dated 3 December 1956, an Examiner of the United States Coast Guard at New York, New York, revoked Appellant's seaman documents upon finding him guilty of misconduct. Two specifications allege that while serving as a messman on board the American SS EXCELLER under authority of the document above described, on or about 28 August 1956, Appellant assaulted a fellow crew member, Oscar Carlson, with a deadly weapon, to wit: a knife; and Appellant used threatening language toward this same seaman at the time of the assault.

At the beginning of the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Although advised of his right to be represented by counsel of his own choice, Appellant elected to waive that right and act as his own counsel. He entered a plea of not guilty to the charge and each specification.

The Investigating Officer and counsel made their opening statements. The Investigating Officer then introduced in evidence the testimony of electrician Carlson, the seaman allegedly assaulted, and that of able seaman Ashburn as well as an entry in the ship's Official Logbook relating to the alleged assault.

In defense, Appellant offered in evidence his sworn testimony and that of two other members of the crew. The latter two witnesses testified that they knew nothing about the incident in question. Appellant testified that he thought this was a frame-up because he did not know anything about the offenses alleged; Appellant was busy working and he did not see Carlson on the afternoon of 28 August 1956; appellant was not logged for this nor did the Master say anything about it to Appellant; he never had any trouble with Carlson.

At the conclusion of the hearing, the oral arguments of the Investigating Office and counsel were heard and both parties were given an opportunity to submit proposed findings and conclusions. The Examiner then announced the decision in which he concluded that the charge and two specifications had been proved. An order was entered revoking all documents issued to Appellant.

The decision was served on 7 December 1956. Appeal was timely filed on 2 January 1957 by counsel for Appellant. No elaboration on the notice of appeal has been received from Appellant or his counsel.

FINDINGS OF FACT

On 28 August 1956, Appellant was serving as a messman on board the American SS EXCELLER and acting under authority of his Merchant Mariner's Document No. Z-1002534 while the ship was in the port of Lisbon, Portugal.

Shortly after 1600 on this date, Appellant was in the crew's messroom setting the tables for the evening meal when the electrician, Oscar Carlson, started to pass through the messroom to the after deck. Able seaman Ashburn was present, having a cup of coffee. As Carlson was about to pass Appellant, the latter picked up an ordinary table knife and held it close to Carlson's throat for several seconds and said, "I'll kill you." There is some indication that the two seamen had exchanged a few words just prior to this but there had been no difficulty between them until this occasion. Carlson left the messroom uninjured and reported the incident to the Master. Seaman Ashburn was the only witness to this incident other than the participants.

Carlson asked the union committee not to bring this matter up at a union meeting on board the ship because he was afraid of what Appellant might do. Consequently, this incident was not mentioned at the union meeting held prior to the arrival of the ship in New York about 8 days later. The Master made a log entry concerning Carlson's report but the record does not disclose that there was a log entry charging Appellant with these offenses.

Appellant has no prior record during 4 years at sea.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant requests a new hearing with counsel, or other appropriate relief, on the following grounds:

1. Appellant was not represented by counsel at the hearing.

2. The order of revocation is excessive.
3. The cross-examination of the witnesses was not conducted so as to ascertain the complete truth.
4. Appellant was not given a fair and impartial hearing.
5. The charge and specifications were not proved beyond a reasonable doubt.

APPEARANCE ON APPEAL: Sheldon Tabak, Esquire of New York City,
of Counsel.

OPINION

The charge and two specifications were proved by substantial evidence consisting of the testimony of Carlson and the eyewitness Ashburn. The degree of proof required in these administrative proceedings is substantial evidence rather than proof beyond a reasonable doubt as in criminal actions. The Examiner specifically stated that he accepted the version of the incident as related by these two seamen and set forth in the above findings of fact. The Examiner rejected Appellant's testimony that he knew nothing about the alleged offense. The evidence does not establish that either one of Appellant's two witnesses, who disclaim knowledge of the incident, were with Appellant at the time the assault has been found to have occurred in the crew's messroom. Under these circumstances, there is no basis for reversing the findings and conclusions of the examiner on the ground of insufficient evidence.

The log entry made by the Master merely corroborates Carlson's testimony that he reported the incident to the Master. This was not a logging of appellant for the offense, consequently there was no requirement that Appellant be given a copy of the entry. Although there is nothing in the record which contradicts Appellant's testimony that he was never called before the Master about the alleged incident, this lack of investigation on board the ship does not preclude the disciplinary proceedings undertaken herein. By the same token, Appellant's unsupported claim that this was a frame-up by the steward and chief cook bears no weight with respect to a complaint by electrician Carlson. Both Appellant and Carlson testified that they had no prior difficulties and barely knew each other. There is no indication by Appellant as to any possible motive that Carlson might have had for fabricating such a story. Also, Ashburn appeared to be a disinterested witness in the matter and his testimony corroborated that of Carlson.

Regarding the absence of any mention of the subject at the union meeting, this does not appear to have any particular

significance. This is so especially in view of Carlson's reluctance to have the matter aired while he was still at sea on the same ship with a man who had held a knife at Carlson's throat.

As to Appellant's contentions that he was neither represented by counsel nor given a fair hearing with proper cross-examination of witnesses, it is noted that Appellant was fully advised of his right to counsel both at the time he was served with the specifications ten days before the hearing and at the beginning of the hearing. Appellant indicated his desire to proceed without counsel. During the course of the hearing, Appellant's rights were fully protected and he conducted creditable cross-examination of the two witnesses appearing against him. Hence, these contentions afford no basis for granting the request for a new hearing.

Appellant also urges that the order of revocation is excessive. I agree with this because the threatening conduct and words of appellant were not consummated by physical contact with Carlson which, legally, would have constituted a battery as well as an assault. Due to this factor and Appellant's four years of service without a prior record, the order will be reduced to a suspension for a period of one year.

ORDER

The order of the Examiner dated at New York, New York, on 3 December 1956, is modified to provide for an outright suspension of twelve months from the date of service of the Examiner's decision which was on 7 December 1956.

As so MODIFIED, said order is AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 20th day of December, 1957.